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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1995

RICHARD FOWLER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. DID THE COURT OF APPEALS ERR IN CONCLUDING THAT THE DENIAL OF THE MOTION TO SEVER THE FIREARM COUNTS FROM THE DRUG COUNTS WAS PROPER?

II. DID THE COURT OF APPEALS ERR IN CONCLUDING THAT THE EVIDENCE OF: (i) THE PETITIONER'S ALLEGED INVOLVEMENT IN A 1990 ATTEMPT TO PURCHASE COCAINE; (ii) PETITIONER'S 1990 POSSESSION OF A FIREARM; (iii) PHOTOGRAPHS SEIZED IN 1990 SHOWING PETITIONER IN 1979 IN POSSESSION OF A FIREARM AND A LARGE AMOUNT OF CASH; AND (iv) THE 1990 SEARCH WARRANT WAS ADMISSIBLE?

III. DID THE COURT OF APPEALS ERR IN CONCLUDING THAT IT WAS PROPER TO INCREASE THE PETITIONER'S OFFENSE TWO LEVELS PURSUANT TO U.S.S.G. SECTION 2D1.1(b)(1) FOR HIS POSSESSION OF A FIREARM?

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OPINION BELOW

The opinion of the Court of Appeals is reported as *United States v. Fowler*, No. 95-5138 (4th Cir. May 13, 1996) (unpublished per curiam opinion); App. 1.

JURISDICTION

The jurisdiction of the Court is invoked under 28 U.S.C. Section 1254(1). The Petitioner was brought before the District Court for the District of Maryland on charges of violations of federal criminal statutes, and the petitioner's conviction was entered on February 6, 1995.

On appeal, jurisdiction for the Court of Appeals for the Fourth Circuit was based on 28 U.S.C. Section 1291 and 18 U.S.C. Section 3742. The court of appeals entered a judgment and opinion affirming the district court's conviction on May 13, 1996.

STATUTES INVOLVED

The questions presented in this Petition for Certiorari do not involve the interpretation of any constitutional provision. Question I involves the interpretation of Rule 14 of the Federal Rules of Criminal Procedure. App. 22 Question II involves the interpretation of Rule 404(b) of the Federal Rules of Evidence. App. 16 Question III involves the interpretation of Section 2D1.1(b)(1) of the United States Sentencing Guidelines. App. 18

STATEMENT OF THE CASE

The Petitioner was indicted on June 2, 1994 in a three count indictment. Count one alleged unlawful possession of a firearm by a convicted felon in violation of 18 U.S.C. Section 922(g)(1); count two charged a false statement in connection with the acquisition of a firearm, in violation of 18 U.S.C. Section 924(a)(1)(A); and count three alleged distribution of a mixture containing cocaine base in violation of 18 U.S.C. Section 841(a)(1).

On June 7, 1994, the Petitioner appeared for his initial appearance and was ordered temporarily detained. On June 14, 1994, a detention hearing was held and the Petitioner was ordered detained pending trial.

The Petitioner filed various pretrial motions including a Motion to Suppress Evidence and a Motion to Sever Offenses. On September 2, 1994, the trial court held a hearing on these motions and denied both motions.

On September 7, 1994, jury selection began and the trial lasted until September 12, 1994. One witness, Renee Butler ("Butler"), testified pursuant to an agreement with the government. Her testimony was supposed to tie the separate events together. However, she was no longer employed with the Petitioner at the time of the second charged offense. After her testimony, the Petitioner again moved for severance, but that motion was denied.

At the conclusion of the trial, the jury returned a verdict of guilty on all three counts. A presentence report was ordered and the Petitioner was detained pending a sentencing hearing.

On February 6, 1995 a sentencing hearing was held and the Petitioner was sentenced to the custody of the United States Bureau of Prisons for a term of 120 months as to count one, 60 months as to count two, and 188 months as to count three to be served concurrently. Upon the Petitioner's release, he is ordered to serve a term of five years supervised release on count three and three years supervised release on counts one and two, each to run concurrently.

The Petitioner noted a timely appeal to the Court of Appeals for the Fourth Circuit. In his appeal, he contended that the motion to sever the firearms count from the drug count should have been granted. The Petitioner also argued that it was error to allow the government to introduce evidence of the Petitioner's alleged involvement in a 1990 attempt to purchase cocaine, the Petitioner's possession of a firearm in 1990, photographs seized in 1990 showing the Petitioner in 1979 in the possession of a gun and a large amount of cash, and the 1990 search warrant.

The Petitioner further argued that it was error to increase the offense level two levels pursuant to U.S.S.G Section 2D1.1(b)(1) for his possession of a firearm at an earlier date. Finally, the Petitioner argued that it was error to increase his offense level by two levels after concluding that he was involved in an attempt to sell 125 grams of crack cocaine.

On May 13, 1996, the Fourth Circuit Court of Appeals, in an unpublished per curiam opinion, affirmed the judgment of the district court.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted in this instance because of the important issues concerning sentencing as a result of this Court's decision in *Bailey v. United States*, ___ U.S. ___, 116 S.Ct. 501, 133 L.Ed.2d 472 (1995). In particular, the impact of *Bailey* in relation to application of U.S.S.G. Section 2D1.1(b)(1) is in need of clarification. The circuits are currently struggling regarding the proper application of the *Bailey* principles in sentencing guidelines hearings.

Additionally, the decision of the Fourth Circuit concerning the test to be applied for admissibility of other crimes evidence is in conflict with other Circuits.

I. The Court of Appeals erred in concluding that the denial of the motion to sever the firearm counts from the drug counts was proper.

The Petitioner was indicted on counts one and two for conduct that occurred on July 26, 1993. The Petitioner was allegedly involved in a "straw" purchase of a firearm on that date and that as a convicted felon, his possession was unlawful. The Petitioner was further indicted for distribution of cocaine, conduct that occurred on September 23, 1993. The government indicted these counts in a single indictment. The Petitioner filed a motion pursuant to Rule 14, Federal Rules of Criminal Procedure, for relief from prejudicial joinder. The Petitioner alleged that the evidence that would be presented in a single trial would not be mutually admissible during separate trials. The government contended that one witness, Renee Butler

("Butler") would provide sufficient support for admissibility through her testimony. The trial court, after hearing argument, denied the Petitioner's motion.

At trial, Butler testified that she began working as a secretary for the Petitioner's moving business approximately in January of 1993 and continued until July 1993. She had a small office, the Petitioner had a separate office and there was a waiting area.

She testified that she met a man named Drew or Mr. Drew and saw him conduct business with the Petitioner. On most occasions, she saw them go into Petitioner's office to talk or handle any business. Drew would carry bags into the office with him, but she could not see the contents of the bags. Shortly after those meetings, Petitioner would ask her to count money for him. The largest amount she recalled having counted was five or six thousand dollars. There were other occasions where Petitioner told Butler that Drew had left money there with him so that he could hold the money for Drew. The money was held by Petitioner in his office, sometimes locked up or in the warehouse.

Butler also met another man who would come to the warehouse on occasion with bags, but she did not see what was in the bags. She would also count money after he left, in the amounts of $500, $1000 or $2000. She was not told where the money came from.

On one occasion, she testified that Petitioner told her that it was important that nothing happened to the money because it was Drew's drug money. Petitioner also told her that he ran errands for Edy and Drew, picking up

or dropping off packages. She did not know the contents of those packages.

During the time she worked at the office, Butler testified that she saw three handguns in the Petitioner's office. Petitioner told her that the firearms were there for office protection. She also testified that there was a significant period of time when there was no firearm in the office, but she could not recall the time period.

At one point, Petitioner asked her to get a firearm for the office, and she initially refused, but later agreed to get a gun. Petitioner explained to her that she should buy the gun because it would be in the office for her protection. Butler filled out an application on May 23, 1993 at the gun shop, using her married name, Brown.

On July 26, 1993, Butler received a call from the gun shop informing her that she could come pick up the gun. She testified that she went to the shop with Petitioner, but after filling out the form in which she falsely indicated the gun was for her use, she went back outside. She testified that she had no role in picking out the gun and didn't care because it wasn't for her use. After completing the transaction, the Petitioner put the gun in the back seat of her car and they drove away. However, ATF agents stopped the vehicle and Butler admitted the gun was for the Petitioner. Butler only worked for the Petitioner a couple more weeks after that incident.

Petitioner again moved for severance of the counts, contending that Butler's testimony did not meet the government's pre-trial proffer that Butler would tie together the July 26, 1993 firearms transaction with the September

23, 1993 drug offense. The trial court again denied the Petitioner's motion.

It is respectfully submitted that the evidence pertaining to the September 1993 drug transactions would not have been admissible in a separate trial on the firearms counts. The trial court must balance any possible prejudice to the defendant against the efficient administration of justice. *United States v. Hines*, 39 F.3d 74, 78-79 (4th Cir. 1994).

The panel decision cites judicial economy as a reason for joinder. App. 7. However, none of the officers involved in the July incident concerning the firearm were involved in the September drug incident. Butler, the sole witness that may have supported judicial economy, did not produce testimony sufficient to create a nexus between the events in July and the events in September.

In *Hines*, judicial economy was furthered because several of the officers were involved in each of the counts for which the defendant was seeking severance. *Id.* In Petitioner's case, different witnesses were needed to establish proof of the firearms counts from the witnesses used to prove the narcotics counts.

There is a high risk of undue prejudice whenever joinder of counts allows evidence of other crimes to be introduced in a trial of charges with respect to which the evidence would otherwise be inadmissible. *United States v. Lewis*, 787 F.2d 1318, 1321 (9th Cir. 1986), *amended*, 798 F.2d 1250 (9th Cir 1986). It is more difficult for jurors to compartmentalize damaging evidence about one defendant derived from joint counts than it is to compartmentalize evidence against separate defendants joined for

trial. *Id.* at 1322; *see also, United States v. Jones*, 16 F.3d 487, 493 (2nd Cir. 1994) (joinder of an ex-felon count with other charges requires either severance, bifurcation or some other ameliorative procedure). The September transaction was a straightforward event, and in a separate trial, the government could not have established any need to include evidence pertaining to the Petitioner's July 1993 acquisition of a firearm.

Even in *Hines*, the Fourth Circuit recognized the special potential for prejudice from joined counts that is created by the risk of improper inferences of criminal propensity. *Id.* Prejudice occurred here when the jury was told of the Petitioner's previous conviction in order to establish the elements for felon in possession of a weapon, where that information would not be admissible in a separate trial for drug distribution. Such evidence is highly inflammatory in the minds of jurors, who now know that they are facing a drug dealer with a gun, rather than a citizen convicted previously of some unknown crime. *United States v. Terry*, 911 F.2d 272, 275 (9th Cir. 1990). A blanket statement concerning guns as "tools of the trade" of the drug business does not create a sufficient nexus between the July and September events.

II. The Court of Appeals erred in concluding that the evidence of: (i) the Petitioner's alleged involvement in a 1990 attempt to purchase cocaine; (ii) Petitioner's 1990 possession of a firearm; (iii) photographs seized in 1990 showing Petitioner in 1979 in possession of a firearm and a large amount of cash; and (iv) the 1990 search warrant was admissible.

Petitioner was charged with one count of distribution of cocaine on September 23, 1993. A detective, Prather, along with an informant, went to the Petitioner's business to purchase an eighth of a kilogram of crack cocaine for $3,500 (the amount should have been $3,800). The Petitioner arrived later, and directed the informant to follow him, but Prather was told to wait when she attempted to follow. Shortly afterwards, the informant returned and brought Prather back to Petitioner's office. Prather then gave Petitioner the $3,500, then she and the informant waited in the office for about 45 minutes. Petitioner returned and Prather saw Petitioner give the informant a bag, which Prather subsequently received. Inside the bag was a quantity of crack cocaine.

The evidence was straightforward concerning this count. An undercover officer (Prather) testified as to observations of the Petitioner distributing a quantity of cocaine. The Petitioner contended through his not guilty plea that the event did not occur and that the government failed to meet its burden of proof in establishing that such a transaction did occur. The Petitioner did not testify and offered no defense.

The government introduced a hodgepodge of evidence which spanned a fourteen year period of time prior to the summer of 1993. This evidence included, first,

evidence of an alleged 1990 attempt to purchase two kilograms of cocaine from an undercover police officer. This attempt was never consummated. Second, a copy of a face sheet of a 1990 search warrant alleging that there was evidence of distribution of controlled substances located at Petitioner's place of business. Third, evidence of a picture of a gun seized in the 1990 search at the Petitioner's place of business. Finally, a photograph that was taken on or before 1979 was introduced into evidence. This photograph showed the Petitioner with a handgun tucked in his belt and showed the Petitioner in possession of stacks of one hundred dollar bills.

The Fourth Circuit relied on the four-part test articulated in *United States v. Bailey*, 990 F.2d 119, 122 (4th Cir. 1993), regarding the admissibility of evidence under Federal Rule of Evidence 404(b). App. 9. *Bailey* permits the introduction of other crimes evidence if it is 1) relevant to an issue other than character; 2) it is necessary to prove an element of the crime; 3) it is reliable; and 4) its probative value is not substantially outweighed by the danger of unfair prejudice. *Id.* at 122. *See also United States v. Delgado*, 56 F.3d 1357, 1365 (11th Cir. 1995) (presenting a not guilty or "mere presence" defense means the government must prove criminal intent in order to negate any innocent explanation, therefore other crimes evidence goes to intent).

The panel opinion upheld the admission of other crimes evidence based on their ability to show the motive or intent of the Petitioner. App. 9. Further, it noted that a plea of not guilty places in issue all elements of the crime charged, including intent. App. 9 (citing *Bailey* at 123). Regarding the admissibility of other crimes evidence,

where the defendant claims he did not commit the act charged, the Fourth Circuit's decision is in conflict with other circuit court decisions.

The Second Circuit has developed a standard for other crimes evidence where the defendant asserts a defense that he did not do the charged act. Where there is no assertion of a lack of knowledge or mistake, there is no issue of intent. *United States v. Ortiz*, 857 F.2d 900 (2nd Cir. 1988), *cert. denied*, 489 U.S. 1070, 109 S.Ct. 1352, L.Ed.2d (1989). The Ninth Circuit is in accord with the Second Circuit. *See United States v. Palmer*, 3 F.3d 300 (9th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 1120, 127 L.Ed.2d 429 (1994). The Ninth Circuit noted that where the defendant asserts a lack of participation, any evidence concerning the motive of the defendant does not establish a material element of the offense. *Id.* at 305.

It follows then that because the motive or intent does not establish a material element of the offense, the evidence further fails the second prong of the four-part test in *Bailey*, because such evidence is not necessary to prove an element of the offense. The Fourth Circuit did find that the introduction of the 1979 photo was highly prejudicial, however, it found such error harmless and did not address the conflict between its holdings and those of other circuits. App. 10. Due to the conflicting decisions regarding the issue of intent and the admissibility of other crimes evidence, certiorari is appropriate.

III. The Court of Appeals erred in concluding that it was proper to increase the Petitioner's offense two levels pursuant to U.S.S.G. Section 2D1.1(b)(1) for his possession of a firearm.

U.S.S.G. Section 2D1.1(b)(1) provides for a two level increase in the offense level where an individual possesses a firearm during the time when he is committing an offense related to the distribution of narcotics. The term "possessed" must be accorded its plain meaning. There must be a connection between the alleged offense and the possession of the weapon. The subheading of the guideline labels the possession of a weapon as a "Specific Offense Characteristic" thereby requiring that the weapon facilitate the offense.

In the instant case, the Petitioner's possession of the firearm was removed by time, place and circumstance from the evidence pertaining to his alleged distribution of cocaine. The weapon was seized months before the alleged distribution of cocaine, before the conviction offense ever occurred. The firearm was never used in any way and never arrived at Petitioner's place of business. It was physically impossible for Petitioner to have "possessed" the firearm seized in July 1993, during a September 1993 drug transaction.

Even the commentary to the statute reflects that the adjustment should be made "if the weapon was present." The term "present" must be given its plain meaning and it is respectfully submitted that in the context of the commentary, the meaning of the term is that the weapon is "at hand" or in the "area immediately surrounding"

the defendant. *See The American Heritage Concise Dictionary* 654 (Houghton Mifflin 3rd ed. 1994) and *Black's Law Dictionary* 1183 (6th ed. 1990). Therefore, a weapon that was seized from the Petitioner in July, two months before the distribution offense occurred, could not be "present" for sentence enhancement.

This Court has stated that statutory terms should be given their plain meaning, and it is respectfully submitted that this directive also applies to the United States Sentencing Guidelines. *See Bailey v. United States*, ___ U.S. ___, 116 S.Ct. 501, 133 L.Ed.2d 472 (1995). The Court even noted that Section 2D1.1(b)(1) "provides enhancement for a person convicted of certain drug trafficking offenses if a firearm was possessed *during* the offense." *Bailey*, 116 S.Ct. at 509 (emphasis added). Further, the Court equated the court of appeals accessibility and proximity test as "virtually synonymous with" possession. *Id.*

There is some confusion as to whether *Bailey* impacts the application of a Section 2D1.1(b)(1) enhancement. *See United States v. Betz*, 82 F.3d 205, 210 n. 3 (8th Cir. 1996) *and United States v. Elder*, 1996 WL411843 (6th Cir. July 24, 1996). Further, many courts are remanding for resentencing under Section 2D1.1(b)(1) because of insufficient facts under 18 U.S.C. Section 924(c) in light of *Bailey*. *See, e.g., United States v. Melendez*, 1996 WL408125 (2nd Cir. July 23, 1996) *and United States v. Clements*, 86 F.3d 599 (6th Cir. 1996) *and United States v. Lang*, 81 F.3d 955, 963 (10th Cir. 1996) *and United States v. Fennell*, 77 F.3d 510, 510-11 (D.C.Cir. 1996). Therefore, this issue will continue to arise as courts attempt to conform their decisions to the mandate of *Bailey*.

It is respectfully submitted that the Fourth Circuit's opinion upholding the enhancement because Petitioner's *purpose* for purchasing the firearm was connected with drugs is insufficient under the statutory language. App. 12 (emphasis added). If Congress had intended this outcome, then it would be reflected in the language of the statute.

The holding of the Fourth Circuit is also in conflict with that of other circuits. The Eighth Circuit requires that the government prove 1) that the weapon was present; and 2) that it is at least probable that the weapon was connected with the offense. *United States v. Payne*, 81 F.3d 759, 762 (8th Cir. 1996). In contrast, the Fourth Circuit allows enhancement if a firearm was "involved in the offense conduct as a whole." App. 12. Such a reading extends the statute beyond its plain meaning.

Although in 1991 Section 2D1.1(b)(1) was amended to remove language stating that enhancement was proper if the weapon was possessed "during the commission of the offense," possession must occur with some relation to the conviction offense, as the heading of the section "Offenses Involving Drugs" dictates. For example, the Tenth Circuit acknowledged that the language was removed from the guideline, the court continued to apply the practice of establishing the possession of a weapon by requiring that there be a temporal and spatial relation between the weapon, the drug trafficking activity, and the defendant. *United States v. Roederer*, 11 F.3d 973, 982 (10th Cir. 1993). The court added that the government must provide evidence that the weapon was found in the same location where the drugs or drug paraphernalia are

stored or where part of the transaction occurred. *Id.* at 983.

The Sixth Circuit continues to use the language eliminated in its test as to whether enhancement was appropriate. In order to apply a Section 2D1.1(b)(1) enhancement, "the government must establish 1) the defendant actually or constructively 'possessed' the weapon, and 2) such possession was during the commission of the offense." *United States v. Hill*, 79 F.3d 1477, 1485 (6th Cir. 1996) (citing *United States v. Sanchez*, 928 F.2d 1450, 1460 (6th Cir. 1991)).

In a more recent case, the Tenth Circuit noted that the term "possession" is not defined in the sentencing guidelines, and therefore must be given its plain meaning. *United States v. Bruce*, 78 F.3d 1506, 1509 (10th Cir. 1996) (interpreting U.S.S.G. Section 2B3.2(b)(3)(A)(iii), requiring enhancement "if a firearm was brandished, displayed, or possessed"). The court distinguished use from possession, citing *Bailey*. Because the defendant possessed the firearms when he wrote the extortion notes, and the firearms were in the home when it was searched, the enhancement was warranted. *Id.* at 1509-10.

Due to the conflict between the decision of the Fourth Circuit and other circuit courts concerning the meaning of the terms "possessed" and "present" clarification on this issue merits a grant of certiorari.

CONCLUSION

For these various reasons, it is respectfully requested that this Court issue a writ of certiorari to the Fourth Circuit Court of Appeals so that the Court may review the Fourth Cirucuit's decision entered in this case.

Respectfully Submitted,

ROBERT C. BONSIB

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. RICHARD S. FOWLER, *Defendant-Appellant.*	No. 95-5138

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
Deborah K. Chasanow, District Judge.
(CR-94-216-DKC)

Argued: March 8, 1996

Decided: May 13, 1996

Before WIDENER, WILKINS, and MICHAEL, Circuit Judges.

Affirmed by unpublished per curiam opinion. Judge Widener wrote a separate concurring opinion.

COUNSEL

ARGUED: Robert Charles Bonsib, MARCUS & BONSIB, Greenbelt, Maryland, for Appellant. Raymond Allen Bonner, Assistant United States Attorney, Greenbelt, Maryland, for Appellee. **ON BRIEF:** Lynne A. Battaglia,

United States Attorney, Greenbelt, Maryland, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Richard S. Fowler appeals his convictions for unlawful possession of a firearm by a convicted felon, *see* 18 U.S.C. § 922(g), making a false statement in connection with the acquisition of a firearm, *see* 18 U.S.C. § 924(a)(1)(A), and distribution of cocaine base ("crack"), *see* 21 U.S.C. § 841(a)(1). Finding no reversible error, we affirm.

I.

Fowler operated a small moving business in Clinton, Maryland. Renee Butler, a government witness, worked as Fowler's secretary from late January through July 1993. While working for Fowler, Butler observed that various persons carrying paper or plastic bags went into Fowler's office to meet with him. After these persons left, Fowler had Butler count money for him. She once counted $5,000 or $6,000 in cash. On one occasion, after a man named Drew left Fowler's office, Fowler mentioned that he was holding money for Drew. Fowler also "mentioned that he couldn't let anything happen to the money because it was Mr. Drew's drug money."

Butler testified that she saw "about three" different guns in Fowler's office, and Fowler told her the guns were there for "office protection." Once, at a point when there were no guns in the office, Fowler asked Butler to buy a gun for the business. Butler initially refused, but she later agreed to make the purchase.

On May 28, 1993, Butler and Fowler went to a gun store, and Butler completed a Maryland State Police application for purchase of a firearm. On July 26, 1993, they returned to the same store to buy the gun. Butler completed an ATF Firearms Transactions Record and bought the gun. An ATF special agent was conducting routine surveillance inside the store that day. He noticed that Fowler, not Butler, was the person interested in the gun. The agent concluded that a straw purchase might be occurring. Shortly after Butler and Fowler left the store, the police stopped their car and confiscated the gun. Butler was questioned by police, and she told them that the gun was actually for Fowler, not herself. Butler quit her job two weeks later.

In August 1993 a confidential informant told the D.C. Metropolitan Police Department that Fowler was involved in narcotics trafficking. A month later, after some additional investigation, the confidential informant arranged for Fowler to sell an eighth of a kilo of crack to an undercover agent, Detective Pamela Prather. On September 23, 1993, the informant and Prather drove to Fowler's business to make the crack purchase. Prather gave Fowler $3,500. Fowler handed the informant a bag, and the informant in turn gave the bag to Prather. Detective Prather saw Fowler hand the bag to the informant. It contained 125 grams of crack.

Four days later, on September 27, 1993, the informant arranged to make another crack purchase from Fowler. Detective Prather and the informant again met Fowler at his business. Prather gave the informant $4,100 in Fowler's presence, and Fowler asked Prather to leave. When Prather went outside, she used a pay phone near Fowler's business, and Fowler happened to see her on the phone. Fowler apparently became suspicious and left without delivering the crack. Later that night, the informant and Prather returned to Fowler's business to complete the transaction. Fowler went up to their car and told them to wait. Fowler then drove up and down the street and looked inside a parked surveillance vehicle. He even got out of his car and looked inside a second parked surveillance vehicle. After the first vehicle moved to a different location, Fowler pulled up behind it, flicked his headlights on bright, and drove away. Prather had no further contact with Fowler that night. She thus left without retrieving the $4,100 the informant had given Fowler earlier that day. The informant did get $3,800 back two days later.

Fowler was indicted for unlawful possession of a firearm by a convicted felon, making a false statement in connection with the acquisition of a firearm, and distribution of crack on September 23, 1993. During the three-day trial, nine witnesses testified for the prosecution. The defense presented no evidence. The jury convicted Fowler on each count. At sentencing the district court increased Fowler's offense level by two after finding that Fowler possessed a firearm in connection with his drug trafficking. *See* U.S.S.G. § 2D1.1(b)(1). The court imposed another two-level increase based on its finding that

Fowler attempted to sell another 125 grams of crack four days after the September 23, 1993, sale. This appeal followed.

II.

Fowler argues (1) that joinder of the firearm and drug counts was impermissible under Fed. R. Crim. P. 8(a), and (2) that the trial court should have severed the counts under Rule 14 because of prejudice from the joinder. We reject both arguments.

A.

We review *de novo* the propriety of joinder of charges in an indictment under Rule 8(a). *United States v. Gorecki*, 813 F.2d 40, 41 (3d Cir. 1987). The rule permits joinder of "two or more acts or transactions connected together or constituting parts of a common scheme or plan." Fed. R. Crim. P. 8(a). "[N]arcotics-related and weapon-related charges may be joined [when they are] sufficiently connected temporally or logically to support the conclusion that the two crimes are part of the same transaction or plan." *Gorecki*, 813 F.2d at 42. A defendant who demonstrates improper joinder must then prove actual prejudice. *Id.* Actual prejudice occurred if the joinder had a substantial and injurious effect on the jury's verdict. *Id.*

Here, the government's theory was that the gun acquired through the straw purchase was related to Fowler's drug trafficking. Testimony showed that Fowler had large amounts of drug money at his business and that he "couldn't let anything happen to the money." We

believe Fowler's need to protect drug money logically connects the gun and drug charges. In any event, Fowler has failed to demonstrate actual prejudice. The testimony of Butler and the ATF agent was more than sufficient to convict Fowler on the gun charges. Likewise, Detective Prather's testimony amply supported Fowler's conviction on the drug charge. Fowler's challenge to joinder under Rule 8(a) is without merit.

B.

The district court's ruling on a pretrial severance motion based on prejudicial joinder under Rule 14 is reviewed for abuse of discretion. *United States v. Hines*, 39 F.3d 74, 78 (4th Cir. 1994). The district court "must balance any possible prejudice to the accused against the interest of the efficient administration of justice." *Id.* at 79 (quoting *United States v. Cole*, 857 F.2d 971, 974 (4th Cir. 1988), *cert. denied*, 489 U.S. 1070 (1989)). Prejudice is minimized where "evidence of all the joined crimes would be mutually admissible for legitimate purposes in separate trials for each offense." *Id.* (quoting *United States v. Jamar*, 561 F.2d 1103, 1106 (4th Cir. 1977)). "This standard does not require that every item of evidence relating to one offense be admissible in a separate trial for the other, but rather looks in a broader sense to whether the rules relating to 'other crimes' evidence have been satisfied." *United States v. Foutz*, 540 F.2d 733, 736 n.3 (4th Cir. 1976).

Fowler argues that severance was necessary because evidence of the joined crimes would not be mutually admissible in separate trials, and because the fact that he was a convicted felon would have been inadmissible at

the trial on the drug count. We believe that severance was not required.

First, joinder promoted judicial economy because Butler's testimony applied to all three counts. Second, most of the evidence of each charged offense was mutually admissible. Evidence of Fowler's straw purchase of the firearm would be admissible in a separate trial on his drug charge because guns are considered "tools of the trade" for drug traffickers. *See United States v. Cooper*, 827 F.2d 991, 995 (4th Cir. 1987). Likewise, evidence of Fowler's drug trafficking would be admissible with respect to the gun charges to show a motive for obtaining the gun. *See* Fed. R. Evid. 404(b) (evidence of other crimes admissible to prove motive). As a precaution, however, the trial court gave the following limiting instruction:

> The indictment contains three counts. Each count charges the defendant with a different crime. You must consider each count separately and return a separate verdict of guilty or not guilty for each. Whether you find the defendant guilty or not guilty as to one offense should not affect your verdict to any other offense charged.

Fowler is correct that the underlying felony the government introduced to prove that Fowler was a felon-in-possession would have been inadmissible in a separate trial on the drug charge. However, we do not think this item of evidence rendered the trial judge's decision an abuse of discretion. The parties stipulated that Fowler had previously been convicted of a felony, and the government did not emphasize the point at trial. In addition, the court instructed the jury that the "stipulation [that Fowler was a convicted felon] was admitted as it relates

to the charges concerning the firearm and you may not consider it on Count Three [the drug charge]." We conclude that the trial court did not abuse its discretion in denying Fowler's motion to sever. *See United States v. Sanko*, 787 F.2d 1249, 1252 (8th Cir. 1986).

III.

Fowler also appeals the admission, over his objection, of evidence of various other bad acts he committed. Detective Ronnie Hairston, an undercover narcotics officer, testified that in May 1990 Fowler met with him to buy two kilos of crack. Fowler negotiated a purchase price of $20,000 per kilo. Fowler then told Hairston that he was going to sell the crack at $26,000 per kilo and that he had a moving business that allowed him to transport the crack. Fowler was then arrested. Detective Barbara Hampton also testified that on June 13, 1990, she executed a search warrant at Fowler's moving business. During that search she found, among other things, a .38 revolver that was inside a bag (a photograph was taken of the gun at the time) and a 1979 photograph showing Fowler with a gun in his waist band and stacks of hundred dollar bills in front of him. The government also introduced a copy of the face sheet of the 1990 search warrant. (With the exception of the 1979 photograph, we will call this the "1990 evidence.")

Fowler argues that none of this evidence was admissible under Rule 404(b). The rule states that

> [e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It

> may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. . . .

Rule 404(b) evidence is admissible if (1) it is relevant to an issue other than character, (2) it is necessary to prove an element of the crime on trial, (3) it is reliable, and (4) its probative value is not substantially outweighed by the danger of unfair prejudice. *United States v. Bailey*, 990 F.2d 119, 122 (4th Cir. 1993); *see* Fed. R. Evid. 403. We think it apparent that the 1990 evidence was necessary and reliable. *See United States v. Hernandez*, 975 F.2d 1035, 1040-41 (4th Cir. 1992). And we find it unnecessary to consider whether the 1979 photograph was necessary and reliable. Therefore, we confine our discussion to the first and fourth requirements, relevance and the danger of unfair prejudice.

The government argues that the 404(b) evidence was "relevant . . . to prove Fowler's knowledge and intent of drug trafficking." Government's Brief at 29. Although a defendant's plea of not guilty places in issue all elements of the crime charged, including intent, "this does not throw open the door to any sort of other crimes evidence." *Bailey*, 990 F.2d at 123. "Evidence to show intent is not admissible when the unrelated bad act is 'tenuous and remote in time from the charges in the indictment.' " *Id.* at 124 (quoting *United States v. Cole*, 491 F.2d 1276, 1279 (4th Cir. 1974)). We hold that 1990 is not too remote. *See United States v. Rawle*, 845 F.2d 1244, 1248 (4th Cir. 1988) (eight years prior not too remote). Thus, the 1990 evidence, that is, evidence of the attempted drug buy in 1990, the gun found in the 1990 search, and the face sheet

of the 1990 search warrant, was relevant to the issue of intent. However, the 1979 photograph was irrelevant to the issue of intent. A fourteen-year gap between the date of the photograph and the crime charged renders the photograph tenuous and remote in time. The government offered nothing to connect the 1979 photograph to the reason for the 1990 search or to the present charges beyond the bald assertion that Fowler was engaged in drug trafficking for many years. That assertion is patently insufficient to establish the relevance of a fourteen-year-old photograph.

The fourth requirement for admissibility of bad act evidence is that its probative value must not be substantially outweighed by the danger of unfair prejudice. "A court should exclude evidence when there is a genuine risk that the emotions of the jury will be excited to irrational behavior, and [ ] this risk is disproportionate to the probative value of the offered evidence." *Hernandez*, 975 F.2d at 1041 (internal quotation marks omitted). Here, we believe that the 1990 evidence was sufficiently probative to warrant admission. But the 1979 photograph utterly fails this balancing test. The fourteen-year-old photograph had no probative value with respect to the 1993 charges. And it is hard to imagine anything more damaging to a defendant in a drug case than his photograph with a gun and stacks of cash. Admission of the 1979 photograph was error.

However, because the other evidence against Fowler was overwhelming, we are compelled to hold that admission of the photograph was harmless error. Nonconstitutional error is harmless if we "can say 'with fair assurance, after pondering all that happened without

stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error.' " *United States v. Ince*, 21 F.3d 576, 583 (4th Cir. 1994) (quoting *Kotteakos v. United States*, 328 U.S. 750, 765 (1946)); *see* Fed. R. Crim. P. 52(a). In making this assessment, we must consider three factors: "(1) the centrality of the issue affected by the error; (2) the steps taken to mitigate the effects of the error; and (3) the closeness of the case." *Ince*, 21 F.3d at 583. Here, the photograph affected the case's central issue of whether the drug transaction occurred. The photograph made it more believable that Fowler was a drug dealer. But the district court mitigated the effect of the error with the following limiting instruction:

> [Y]ou may not consider the evidence of the similar acts as a substitute for proof that the defendant committed the crimes charged. Nor may you consider this evidence as proof that the defendant has a criminal personality or character. The evidence of other similar act was admitted for a much more limited purpose and you may consider it only for that limited purpose.

Again, this was not a close case. As we previously explained, the testimony of Butler and the ATF agent strongly supported Fowler's convictions on the firearm charges. And the testimony of Butler and various law enforcement officers involved in the crack purchases provided overwhelming evidence of Fowler's guilt on the distribution charge. Therefore, we are confident that the "judgment was not substantially swayed by the error," *Kotteakos*, 328 U.S. at 765, and we affirm the convictions.

We do pause to note that we cannot imagine how the government thought the 1979 photograph was admissible. Indeed, we cannot understand why the government would risk jeopardizing an already strong case by introducing "bad acts" of fourteen years ago. Our conclusion that the error was harmless should not be taken by the government as a license to offer this kind of plainly inadmissible evidence in the future.

IV.

Fowler next argues that the district court erred by increasing his offense level by two, pursuant to U.S.S.G. § 2D1.1(b)(1), for possession of a firearm. He says that there was not a sufficient temporal and spatial relationship between the commission of the principal offense and the possession of the firearm. We disagree.

U.S.S.G. § 2D1.1(b)(1) provides, "If a dangerous weapon (including a firearm) was possessed, increase by 2 levels." The Application Notes state, "The adjustment should be applied if the weapon is present, unless it is clearly improbable that the weapon was connected with the offense." A firearm need not be directly involved in the crime of conviction so long as the district court finds that a firearm was involved in the offense conduct as a whole. *United States v. Falesbork*, 5 F.3d 715, 720-21 (4th Cir. 1993). However, the temporal remoteness of the defendant's contact with the gun from his crime of conviction may be great enough to render an increase under § 2D1.1(b)(1) improper. *Id.* (four or five month time gap did not render increase improper). In this case, the district court found that "the purpose of the purchase of the

firearm in Count One . . . was because of the situs of the distribution of the drugs at the office." This finding, which is supported by Butler's testimony that Fowler needed to protect drug money, is not clearly erroneous. We therefore affirm the enhancement.

V.

Finally, Fowler argues that the district court erred by further increasing his offense level by two because the court's conclusion that he was involved in an attempt to sell 125 grams of crack on September 27, 1993, was clearly erroneous. He concedes that an attempt to distribute 125 grams of crack would warrant a two-level increase as relevant conduct under U.S.S.G. §§ 2D1.1 and 1B1.3(a)(2) if supported by sufficient evidence. However, Fowler says the only evidence of an attempt was that the informant was given $4,100 in cash and that the informant returned $3,800 two days later. We disagree. There was also evidence that Fowler became concerned when he saw Prather on the phone, that he conducted countersurveillance activities, and that the attempt occurred when Fowler was engaged in an active drug business. The district court's finding on the attempted sale was not clearly erroneous, and the additional two-level increase was proper.

VI.

Fowler's convictions and sentence are affirmed.

AFFIRMED.

WIDENER, Circuit Judge, concurring:

I concur in the result as to the gun charge solely because there was direct, unimpeached and unquestioned evidence that Fowler was carrying a gun when he left the store: "Mr. Fowler was carrying the gun, he carried the gun out of the store and we got into the car and drove off." Butler's testimony, A.104.

I concur in the result as to the drug charge solely because there was also direct, unimpeached and unquestioned evidence that Fowler handed the illegal drugs to the informant: "Fowler handed the informant a bag, and the informant in turn gave the bag to Prather. Detective Prather saw Fowler hand the bag to the informant. It contained 125 grams of crack." Slip op. at 3, Prather's testimony, A.188-189.

Absent such overwhelming evidence, the overkill exhibited by the government in this case with respect to other bad acts might well have resulted in the release of a patently guilty drug dealer.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 95-5138
CR-94-216-DKC

UNITED STATES OF AMERICA

Plaintiff – Appellee

v.

RICHARD S. FOWLER

Defendant – Appellant

ORDER

(FILED June 20, 1996)

The appellant has filed an untimely petition for rehearing and suggestion for rehearing in banc. This Court strictly enforces the time limits for filing petitions for rehearing and suggestions for rehearing in banc.

The Court denies the petition for rehearing and suggestion for rehearing in banc as untimely filed.

For the Court – By Direction

/s/ Bert M. Montague
CLERK

Rule 404. Character Evidence Not Admissible To Prove Conduct; Exceptions; Other Crimes

(a) Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;

(2) Character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) Character of witness. Evidence of the character of a witness, as provided in rules 607, 608, and 609.

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

(Pub.L. 93-595, § 1, Jan 2, 1975, 88 Stat.1932; Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 30, 1991, eff. Dec. 1, 1991.)

PART D – OFFENSES INVOLVING DRUGS

1. UNLAWFUL MANUFACTURING, IMPORTING, EXPORTING, TRAFFICKING, OR POSSESSION; CONTINUING CRIMINAL ENTERPRISE

§2D1.1. Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy

(a) Base Offense Level (Apply the greatest):

(1) **43.** if the defendant is convicted under 21 U.S.C. § 84(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a similar offense; or

(2) **38.** if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or

(3) the offense level specified in the Drug Quantity Table set forth in subsection (c) below.

(b) Specific Offense Characteristics

(1) If a dangerous weapon (including a firearm) was possessed, increase by 2 levels.

(2) If the defendant unlawfully imported or exported a controlled substance under circumstances in which (A) an aircraft other than a regularly scheduled commercial air carrier was used to import or export the controlled substance, or (B) the defendant acted as a pilot, copilot, captain, navigator, flight officer, or any other operation officer aboard any craft or vessel carrying a controlled substance, increase by 2 levels. If the resulting offense level is less than level 26, increase to level 26.

(3) If the object of the offense was the distribution of a controlled substance in a prison, correctional facility, or detention facility, increase by 2 levels.

(4) If the defendant meets the criteria set forth in subdivisions (1)-(5) of §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases) and the offense level determined above is level 26 or greater, decrease by 2 levels.

* * *

Commentary

Statutory Provisions: 21 U.S.C. §§ 841(a), (b)(1)-(3), 960(a), (b). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. *"Mixture or substance" as used in this guideline has the same meaning as in 21 U.S.C. § 841, except as expressly provided. Mixture or substance does not include materials that must be separated from the controlled substance before*

the controlled substance can be used. Examples of such materials include the fiberglass in a cocaine/fiberglass bonded suitcase, beeswax in a cocaine/beeswax statue, and waste water from an illicit laboratory used to manufacture a controlled substance. If such material cannot readily be separated from the mixture or substance that appropriately is counted in the Drug Quantity Table, the court may use any reasonable method to approximate the weight of the mixture or substance to be counted.

An upward departure nonetheless may be warranted when the mixture or substance counted in the Drug Quantity Table is combined with other, non-countable material in an unusually sophisticated manner in order to avoid detection.

Similarly, in the case of marihuana having a moisture content that renders the marihuana unsuitable for consumption without drying (this might occur, for example, with a bale of rain-soaked marihuana or freshly harvested marihuana that had not been dried), an approximation of the weight of the marihuana without such excess moisture content is to be used.

2. *The statute and guideline also apply to "counterfeit" substances, which are defined in 21 U.S.C. § 802 to mean controlled substances that are falsely labeled so as to appear to have been legitimately manufactured or distributed.*

3. *Definitions of "firearm" and "dangerous weapon" are found in the Commentary to §1B1.1 (Application Instructions). The enhancement for weapon possession reflects the increased danger of violence when drug traffickers possess weapons. The adjustment should be applied if the*

weapon was present, unless it is clearly improbable that the weapon was connected with the offense. For example, the enhancement would not be applied if the defendant, arrested at his residence, had an unloaded hunting rifle in the closet. The enhancement also applies to offenses that are referenced to §2D1.1; see §§2D1.2(a)(1) and (2), 2D1.5(a)(1), 2D1.6, 2D1.7(b)(1),2D1.8, 2D1.11(c)(1), 2D1.12(b)(1), and 2D2.1(b)(1).

4. *Distribution of "a small amount of marihuana for no remuneration", 21 U.S.C. § 841(b)(4). is treated as simple possession, to which §2D2.1 applies.*

5. *Any reference to a particular controlled substance in these guidelines includes all salts, isomers, and all salts of isomers. Any reference to cocaine includes ecgonine and coca leaves, except extracts of coca leaves from which cocaine and ecgonine have been removed.*

6. *Where there are multiple transactions or multiple drug types, the quantities of drugs are to be added. Tables for making the necessary conversions are provided below.*

7. *Where a mandatory (statutory) minimum sentence applies, this mandatory minimum sentence may be "waived" and a lower sentence imposed (including a sentence below the applicable guideline range), as provided in 28 U.S.C. § 994(n), by reason of a defendant's "substantial assistance in the investigation or prosecution of another person who has committed an offense." See §5K1.1 (Substantial Assistance to Authorities). In addition 18 U.S.C. § 3553(f)*

Rule 14. Relief from Prejudicial Joinder

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection *in camera* any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial.

(As amended Feb. 28, 1966, eff. July 1, 1966.)